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OFFICE OF PETITIONS

In re Application of :
Qun Zhao et al :
Application No. 09/843,143 :
Filed: August 13, 2001 :
Attorney Docket No. 00-117/123 :

ON PETITION

This is a decision on the petition under 37 CFR 1.137(b), filed November 9, 2004, to revive the above-identified application. This is also a decision on the petition under 37 CFR 1.183 to suspend the rules.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The petition under 37 CFR 1.183 is **DISMISSED**.

The above-identified application became abandoned for failure to reply in a timely manner to the Notice To File Missing Parts Of Nonprovisional Application mailed June 25, 2001, which set a shortened statutory period for reply of three (2) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on August 26, 2001.

With respect to the petition under 37 CFR 1.183:

As noted in the Notice Of Incomplete Reply mailed September 25, 2001, petitioner failed to submit the required substitute drawings in compliance with 37 CFR 1.84.

Petitioner contends that he never received the Notice mailed September 25, 2001. Although the USPTO attempts to notify parties as to required or defective papers in order to permit timely refiling, it has no obligation to do so. See In re Colombo Inc., 33 USPQ2d 1530, 1532. (Comm'r Pat. 1994). Rather, it is the applicants who are ultimately responsible for filing proper documents. Id. That is, applicant was given Notice in the June 25, 2001, notice that applicant had to submit substitute drawings in compliance with 37 CFR 1.84 or risk abandonment. Moreover, petitioner was given an additional opportunity to comply with the requirement in the communication of September 25, 2001. The failure to supply the proper, full and complete reply by August 25, 2001, was the fault of petitioner, not the USPTO. As noted in Brenner v. Ebbert, 398 F.2d. 762, 765, 157 USPQ 609, 611 (D.C. Cir. 1968), cert. den. 159 USPQ 799:

The Constitution requires notice reasonably designed to forewarn against approaching default; but it does not insure against the effects of a mistaken response to timely notice knowingly received.

It follows that petitioner had received the reasonable notice required so as to ensure a timely and full response to the Notice of June 25, 2001. That petitioner failed to timely and adequately respond was unfortunate, but such failure did not operate to save this application from abandonment (35 U.S.C. 133), nor was the failure to properly reply a circumstance beyond the control of petitioner in the exercise of reasonable care and diligence. See Brenner, supra. As such, there is no adequate showing of "an extraordinary situation" in which "justice requires" suspension of the rules. See, Nitto Chem. Indus. Co. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (circumstances are not extraordinary, and do not require waiver of the rules, when a party makes an avoidable mistake in filing papers). Even assuming, arguendo, as petitioner contends, that clerical inadvertence or mistake led to petitioner's failure to submit a proper reply, such is not a grounds for requesting waiver of the regulations. See In re Kabushiki Kaisha Hitachi Seisakusho, 39 USPQ2d 1319, 1320 (Comm'r Pat. 1994) (clerical error causing delay leading to a loss of right does not warrant suspension of the rules).

Circumstances resulting from petitioner's failure to exercise due care, or lack of knowledge of, or failure to properly apply, the Patent statutes or rules of practice are not, in any event, extraordinary circumstances where the interests of justice require the granting of relief. See, In re Tetrafluor, Inc., 17 USPQ2d 1160, 1162, (Comm's Pats. 1990); In re Bird & Son, Inc. 195 USPQ 586, 588 (Comm'r Pats. 1977).

The \$130 fee for the petition under 37 CFR 1.183 is being charged to deposit account no. 50-2041 as authorized.

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3208.

This matter is being referred to Technology Center AU 2832.


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for Patent Examination Policy